

Protest of)	Date: December 23, 1992
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BARRETTI CARTING CORPORATION)	
)	
Solicitation No. 339990-92-A-0320)	P.S. Protest No. 92-92

DECISION

Barretti Carting Corporation (Barretti) protests the cancellation of solicitation 229990-92-A-0320 for rubbish removal services in the New York, NY, area.

The solicitation was issued on June 16 by the Procurement Services Office, East Orange, NJ, seeking offers for trash pickup at 56 postal facilities. Prices were requested per cubic yard, and estimates were furnished for the number of cubic yards per facility for the contract period (one year). Offers were due July 10.

The contracting officer's statement on the protest notes that the solicitation was the subject of five amendments which were issued before and after offers were received July 10. (The protest file does not reflect the state of the unamended solicitation, but it does contain a copy of the solicitation as amended through amendment A04, copies of the amendments, and the protester's offer, which incorporates only amendment A01.) The amendments are as follows:

Amendment A01, June 22. The amendment increased the frequency of pickup at various sites, provided container quantities and sizes for the E.S.S.P.A. site in the Bronx, and identified a contact person for site visits. All of the offerors acknowledged receipt of Amendment A01.

Amendment A02, June 30. The amendment changed the solicitation's provision concerning the use of a recycling contractor. As issued, the solicitation designated a facility for the recycling of undeliverable bulk business mail. As amended, offerors were to identify the name of the recycling company they intended to use for the recycling program. The amendment corrected an inconsistency in the solicitation's collection requirements (while Section A had identified weekly pickup frequencies per facility, Section C had stated that collection was to be "as needed"), and included a schedule of federal holidays on which no work would be performed. Finally, the amendment changed the evaluation criteria in section M.3. As issued, offers were to be evaluated on the basis of the following factors, in descending order of importance:

Price
Available resources: Equipment and backup equipment
Past performance & History

As revised, the factors were listed as:

Price
Available resources: Equipment and backup equipment
Past performance & History
Recycling program
Offeror's organization, personnel, qualifications, capability and experience

As discussed further below, only one offeror timely acknowledged receipt of amendments A02.

Amendment A03, August 25. The amendment replaces a reference to service in Bronx, NY, to New York, NY, on the cover page, changes the name of the contracting officer's representative on page one, deletes various provisions in section C (Delivery Order Limitations; Warranty Exclusion and Limitation of Damages, and Clearance Requirements), and replaces section M.1, Contract Award, with a current version.^{1/} No offerors timely acknowledged receipt of amendment A03.

Amendment A04, September 24. The amendment replaced the Service Contract Act wage determination contained in the solicitation (No. 88-0768 (Rev. 5), May 1, 1991) with a more current determination (No. 88-0768 (Rev. 8), June 4, 1992).^{1/} No offerors timely acknowledged receipt of amendment A04.

Amendment A05, October 27. This amendment canceled the solicitation, stating, in part:

Subject solicitation and specification has [sic] been extensively revised, requiring cancellation. All Offerors will receive a new solicitation in November of 1992.

^{1/} Amendment A03 consists of the amendment cover sheet and twelve replacement pages for the solicitation, including replacements for the table of contents, pages i - iv. The listing in the new table of contents reflects a new pagination for much of the solicitation which is not accounted for by the substitute pages in the amendment but is reflected in the solicitation in the protest file. The only substantive change not reflected in Amendment A03 is the deletion of section K.8, Evaluation of Options. While the solicitation contained in the protest file reflects the revised pagination consistent with the index revised in amendment A03, nothing demonstrates conclusively that the repaginated pages and the revised section K were part of amendment A03 or otherwise transmitted to the offerors.

^{2/} The relevance to the solicitation of the wage determination appears limited, since it establishes wages for refuse collectors and truck drivers, refuse collection, only for Rockland County, NY, and not for the counties which the solicitation covers.

The contracting officer considers amendment AO2 to be the most significant change to the solicitation because it removed the requirement that the offerors use a specified recycling company, allowing offerors to propose their own.

The contracting officer's report details obvious irregularities concerning the distribution of the amendments. When queried in mid-October, the vast majority of the offerors contended that they had never received amendments A02 through A04. Several of the offerors subsequently advised that the amendments were received from the PSO by Priority Mail on October 23 or October 26. The contracting officer's report also reflects conflicts between the contracting officer and the contract specialist who was primarily responsible for conducting the solicitation. Following the incident discussed above concerning amendment distribution, the contract specialist denied having sent the amendments to the offerors who acknowledged receiving them. In another instance, on October 20, the contract specialist had issued requests for best and final offers to some of the offerors. The contracting officer notes that he had been unaware that the requests had been issued, that he had not requested that they be issued, and that when he subsequently questioned the contract specialist about the matter, the contract specialist contended that the contracting officer had directed him to issue the requests.

As noted above, the contracting officer canceled the solicitation by amendment A05, dated October 27. Barretti's protest followed.^{1/} The protester asserts that it was the low "bidder" with respect to the solicitation, that as the result of the resolicitation the terms of its offer will become public, and that it will be disadvantaged as a result. The protester requests that the previous "bids" be allowed to stand, or, alternatively, that if a new solicitation is issued, that the previous offerors be limited to their previous prices. The protest asserts that the missing amendments "in no way changed the essential terms of the contract," and that, as a result, Barretti did not alter its offer with respect to them.

The contracting officer's statement contends that the problems set out above with respect to the timing of the amendments fully justify the cancellation of the solicitation. The contracting officer notes that even if Barretti had submitted the lowest aggregate price on the solicitation (an assumption which the contracting officer's statement does not confirm or deny), it would not necessarily be entitled to the award because the solicitation provided for multiple awards, and that, based on the offers received, multiple awards would be cost effective for the Postal Service, and further because, in accordance with section M of the solicitation, offers were to be evaluated on the basis of factors in addition to price. The contracting officer further notes that the protester's concerns about the possible disclosure of its prices, etc., are speculative and have no basis in fact. According to the contracting officer, the protester's prices and terms have not, and will not be disclosed. The contracting officer asserts that his determination to cancel the solicitation was neither arbitrary or capricious nor an abuse of his discretion, and recommends that the protest be denied.

^{3/} The initial protest, dated November 2, incorrectly asserted that the protester was advised of the cancellation by a letter dated July 27. Pursuant to Procurement Manual (PM) 4.5.7 p., this office summarily dismissed the protest as untimely as received more than "ten working days after the information on which they are based is known or should have been known. . . ." PM 4.5.4 d. Barretti promptly submitted a new protest letter which corrected the July 27 date to October 27. Because the revised letter appeared timely on its face, we requested the contracting officer's statement on the protest.

The protester has submitted additional comments on the contracting officer's statement which reiterate its understanding that the omitted amendments did not substantively change the solicitation and assert its understanding that solicitations should be canceled only if the service solicited is no longer required or if the needs of the Postal Service have been so substantially changed that a new solicitation is required. In the protester's view, neither condition allows cancellation here.

Two offerors have submitted substantive comments on the solicitation. One asserts that it, too, assumes that it has submitted "the lowest responsible bid," but notes that it believes the amendments would affect the structure of its prices, and notes that the Postal Service could always ask for best and final offers under the proposal. The other agrees with the protester that the amendments did not alter its proposal, does not understand why cancellation was required, complains of the burden on offerors of having solicitations open for extended periods, and asserts that "our offers were common knowledge to many within the procurement office, as well as our own industry, after the July 10, 1992, due date." The offeror notes that it recently lost a key employee with knowledge of the solicitation.

Discussion

PM 4.1.2 j. provides, in part, as follows:

Cancellation of Solicitations. Solicitations may not be canceled unless circumstances make cancellation essential, such as when there is no longer a requirement for the supplies or services, or the solicitation requires amendments of such magnitude that a new solicitation is needed. . . .

Here, the amendment canceling the solicitation asserted the second of the illustrative grounds which the regulation offers, the need for extensive amendment of the solicitation.^{4/} However, the contracting officer's statement does not identify any additional changes (that is, changes beyond the changes already made by the irregularly issued amendments) which the solicitation requires. Instead, the contracting officer's statement asserts that the process by which the solicitation amendments were issued resulted in an unfair procurement process, and that as a result it was in the Postal Service's best interest to cancel the solicitation and resolicit.

When we review a contracting officer's decision to cancel a solicitation and resolicit, we will overturn that decision only if it is arbitrary, capricious or not supported by substantial evidence. Cf., VNP Vending Corporation, P.S. Protest No. 87-107, February 4, 1988 (same standard for cancellation of invitations for bids). Here, the contracting officer had adequately demonstrated circumstances which establish that it was essential to cancel the solicitation. The record indicates serious internal mishandling of the solicitation, casting doubt upon the fairness of the competition, which would justify resolicitation. Cf., DGS Contract Services, Comp. Gen. Dec. B-243647.2, 91-2 CPD & 258, September 18, 1991 (improprieties in the course of a

^{4/} Contrary to the protester's suggestions, the circumstances listed in the regulation are illustrative, and are not the only circumstances which may justify the cancellation of a solicitation.

negotiated procurement provide a reasonable basis to justify cancellation of a request for proposals).

The protester appears to misunderstand the nature of the negotiated procurement process which is applicable to this solicitation.^{1/} Because offers in negotiated procurement are not publicly opened (and the procurement regulations preclude the disclosure of their contents, see PM 4.1.2 k.3.), offerors are not put at risk of having the information in their offers revealed to other prospective contractors. At the same time, because the offers may be the subject of revision in the course of discussions, offerors may not properly assume that an offer which was initially the most favorable may not be displaced by another's offer which is improved in the course of discussions.^{1/}

Had the amendments which not received been timely issued to the offerors, they might have allowed offerors to submit more advantageous offers or (as to the amendments dated after the receipt of initial offers) to revise their offers to the extent that the amendments required them to revise the offers.^{1/} It is not a sufficient alternative belatedly to provide the unreceived amendments to those who submitted offers. When a solicitation is amended before offers are due, the amendment must be sent to all prospective offerors. PM 4.1.2 i.3.(a). The amendment of potentially greatest significance, AO2, which relaxed the requirements concerning the recycling subcontractor, if timely received by the prospective offerors, might have allowed additional offerors to propose, thereby increasing competition.

The protester's specific concern that its offer may have been disclosed is, as the contracting officer notes, merely speculative, and such an unsupported assertion is insufficient to support its position. See Penny H. Clusker, P.S. Protest No. 80-37, August 27, 1980. In any event, exposure of initial offers would be a risk whether the original competition were reopened or a new solicitation begun.

While we acknowledge the concern of the interested party who noted the cost to the

^{5/} One evidence of this confusion is the protester's use of the term "bid" to describe its offer. That term is correctly used only to describe an offer made in formally advertised procurements. Cf., Marathon, Inc., P.S. Protest No. 91-14, March 28, 1991.

^{6/} The distinction is reflected in the different standards applicable to the cancellation of formally advertised procurements ("invitations for bids" or IFBs) and negotiated procurements. Compare PM 12.7.7 e.1. ("compelling reason" necessary to cancel advertised solicitation after bids are exposed) with 12.7.3. f. (advertised solicitation may be canceled before bids received "in the interest of the Postal Service") and 4.1.2 j., (negotiated solicitation may be canceled before or after proposals received if "circumstances make cancellation essential.")

In government procurements conducted pursuant to the Federal Acquisition Regulation, the standard for cancellation of a negotiated procurement is "a reasonable basis," rather than the "cogent and compelling reason" required for cancellation of an IFB. The Comptroller General has explained that the reason for the difference is that "bids in response to an IFB are publicly exposed, and to reject them and seek new bids would discourage competition." HBD Industries, Inc., Comp. Gen. Dec. B-242010.2, 91-1 CPD & 400, April 23, 1991.

^{7/} Neither amendment A03 nor A04 explicitly provided for such revisions by establishing a new closing date for the submission of revised offers.

offerors of the delay which has already occurred, we can envision no remedy which could correct it. The major delay has already occurred, and the resolicitation need not necessarily delay contract award significantly longer than the reopening of the contract and the evaluation of revised offers would.

Finally, we note that resolicitation of the requirement will allow for the correction of a deficiency in the solicitation as it existed when it was canceled. As noted above, the solicitation evaluation factors included the consideration of various technical factors in addition to price. However, nowhere did the solicitation provide for the submission of technical proposals which touched substantially on those technical factors, nor does the evaluation scheme adequately explain the relationship of the technical factors to the price factor. The new solicitation should deal more adequately with these issues.

The protest is denied.

For the General Counsel:

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Contract Protests and Policies